

Supinna (Migration) [2018] AATA 1385 (9 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Sudarat Supinna
CASE NUMBER:	1620147
DIBP REFERENCE(S):	CLF2013/147374
MEMBER:	Russell Matheson
DATE:	9 April 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations.

Statement made on 09 April 2018 at 10:40am

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Genuine and continuing relationship – Joint account – Joint household – Family support of relationship – Long term relationship – Strong degree of companionship – Credible witness

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2 cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 November 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a 29 year old female national of Thailand. She applied for the visa on 28 June 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the applicant was the spouse of the sponsor.
4. The applicant appeared before the Tribunal on 7 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and two witnesses Mrs Feungfa Richardson (mother in law) and Ms Helga Ipong (friend). The Tribunal hearing was conducted with the assistance of an interpreter in the Thai and English languages.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
8. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
9. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

10. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate indicating that the couple were married on 24 March 2013 at McMahon's Point. The marriage was registered in the state of New South Wales under the Births, Deaths and Marriages Registration Act 1995. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

13. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
14. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied that the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Furthermore, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
15. The Tribunal has considered the documentary evidence submitted with the application and the considerable amount of additional documentary evidence that has been submitted to the Tribunal. The Tribunal has also had the benefit of the applicant's and the sponsor's oral evidence and two witnesses. The Tribunal found the applicant and the sponsor to be credible witnesses who presented detailed and consistent evidence during the hearing.
16. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the explanations offered are plausible. The applicant also provided a written response to the delegates concerns.

17. Financial Aspects

18. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.

19. The parties stated that they have a joint account together and the sponsor deposits his wages into that account. The applicant told the Tribunal that the sponsor pays all the bills from the joint account and manages all their finances. She further stated that she works in a café in Sydney and is paid \$500 week cash money. The applicant informed the Tribunal that she gives half of her earnings to the sponsor to pay bills and keeps the other half for day to day living expenses. The sponsor said that he has a personal loan for the purchase of a motor vehicle which he hopes to discharge within 3-4 years. The applicant had a sound knowledge of the sponsor's personal income, rental payments, joint bills and financial affairs.
20. The Tribunal accepts on oral evidence that the parties are prepared to share their financial resources although there is limited supporting documentary evidence. The Tribunal accepts that the sponsor manages the financial aspects of the parties' relationship.
21. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is limited evidence before the Tribunal to support that the parties share the day to day living expenses.
22. The parties presented limited evidence of the financial aspects of the relationship to support that they are in a genuine and continuing relationship. The Tribunal places little weight on this aspect of the relationship.

23. Nature of the household

24. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
25. The couple gave detailed and consistent evidence about their living arrangements and the household duties and responsibilities. The Tribunal is satisfied that they live together. The applicant and the sponsor spoke about sharing the different aspects of housework and individual tasks in detail. They provided consistent evidence of their living arrangements and details about their daily lives and activities. The parties provided additional documentary evidence in joint names and stated that they have advised government authorities such as the ATO and Centrelink in relation to their marital status.
26. Tribunal accepts the parties live together and that they have established a joint household. The Tribunal is satisfied that they share the household duties and responsibilities.

27. Social aspects

28. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
29. The Tribunal accepts that the relationship is socially recognised by family and friends. There are several statements from third parties, including close family members, who express their view that the relationship is a genuine one. The couple presented photographic evidence of various family and social activities that they have attended together. In oral evidence the couple outlined their social activities and referred to having a close relationship with family members. The parties provided detailed oral evidence and photographic evidence in relation to travelling domestically and internationally, dining out with friends and attending community events together.

30.

31. The Tribunal is satisfied they plan and undertake joint social activities and represent themselves to others as being married to each other. The Tribunal accepts that the parties' family and friends accept that they are in a genuine and continuing spousal relationship. The Tribunal is satisfied that there is family support for the relationship.

32. Commitment

33. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
34. The parties claim to have known each other since 2003 and stated they entered into a committed relationship in 2007. The parties married in March 2013 in Australia and had a traditional Thai wedding in Thailand inviting over 500 guests in November 2017. The Tribunal accepts that the parties are legally married. The parties have been in a long term relationship and have been married for a period exceeding 5 years. The parties stated that they are focussing on their financial security, discharging the sponsor's person loan. They further stated that they would complete their studies to gain better fulltime employment so they could start a family and purchase their own home. The applicant is focused on becoming a primary school teacher when she completes her studies. The parties said that were also considering working full time in Japan if the opportunity arose because the money and opportunities are better overseas.
35. The parties stated that they have supported and cared for each other during traumatic times, health and illness. The applicant said that the sponsor has always been there for her emotionally and during financial insecurity when she was unemployed. She further stated that he had cared for and supported her when her mother passed away two years ago. The parties stated that they have been in a long term relationship and have always been there for each other and wish to build a better life and future together. The Tribunal is satisfied the couple view their relationship as a long term one.
36. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations. The Tribunal is satisfied the parties provided each other a strong degree of companionship and emotional support that is commensurate with a couple being in a marital relationship.

37. Findings

38. Having considered all aspects of the relationship, the Tribunal is satisfied that the applicant and the sponsor have a mutual commitment to shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship.
39. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision.
40. Therefore the applicant meets cl.801.221(2)(c).

41. Conclusion

42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

43. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2)(c) of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).